United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1909.

No. 2042.

JAMES STEVEN AND JAMES STEVEN, JR., DOING BUSINESS AS THE STEVEN & SON COMPANY, APPELLANTS,

vs.

ROSA BELLE SAUNDERS, ADMINISTRATRIX, APPELLEE.

BRIEF FOR APPELLANTS.

Statement of the Case.

The defendant was engaged in setting the stone work on what is now known as the Senate Office Building. At the time of the grievances complained of by the plaintiff the defendant had progressed in said work to the setting of the balustrade or railing around the top of the building. The balustrade consisted of certain pilasters or columns, set at intervals, with the coping along and over the tops of the same. Between the open work were certain sections of solid masonry and it was between these solid sections of masonry that the pilasters and coping were placed. The method of setting these stones was to place a dowel of slate in the bottom of each pilaster or column, which said dowel also sunk into a hole cut in the base on which the column was to rest. After all the columns were set, or a

sufficient number to take the coping intended to fit as a cover or railing over the same, the top railing or coping was placed thereon. There were holes two and one-fourth inches square cut in the tops of the pilaster, sand holes of like size cut in the under part of the coping into which dowels were to be cemented when the two stones were brought together. The process was to fill the holes in the pilasters with thin, watery, slow setting cement, put the dowel in, cover the top of the dowel with other cement and then lower the piece of coping so as to have the holes on its under side fit over the dowels projecting up from the top of the pilasters. The dowels were two inches square and the holes intended to receive them a trifle larger. On the 21st day of January, 1908, just previous to the noon hour, there had been set a row of pilasters between two solid abutments on which there had been set two pieces of coping. The cement holding these pieces was in a green state. The same morning a conversation had taken place between the defendant's superintendent and one of the workmen named Maddox, the latter being employed as a stone-mason. The superintendent complained that the stones were not being set fast enough, whereupon Maddox replied that it was due to the fact that the dowels did not fit, whereupon the superintendent is alleged to have said: "Fit Hell! Damn it, cut them off; get them down; set them stones. If you cannot set them, by God, I can get a man that can set them" (Rec., p. 19.) After the noon hour the superintendent came up again and this time spoke of a piece of stone forming part of the solid portion of the balustrade as being out of plumb. At the time there was a stone hanging in the swing of the derrick. The superintendent called to one of the laborers by the name of Dotts and told him to land that stone, meaning the stone in the derrick swing, whereupon

Dotts climbed up on one of the sections of solid masonry forming part of the balustrade and walked along the top of the railing until he reached the point where the newly laid pieces of coping had been set just previous to the noon hour. He then caught hold of one of the newly set pieces and started to climb down on the outer edge of the balustrade on to the cornice of the building. The cornice was about five and one-half feet lower than the top of the coping of the balustrade. In climbing down a piece of the green-set coping, which he was holding on to, slipped from its bed, struck him in the breast and knocked him off the wall. As the piece of coping itself fell it carried with it one pilaster. The latter fell to the ground while the piece of coping itself struck the cornice, broke into two pieces, one of which remained on the cornice while the other fell to the ground below and struck plaintiff's intestate, instantly killing him. The deceased was employed as a hoisting engineer and at the time of his death was standing at the side of his engine. The engine was about ten feet from the building and uncovered. It was as far as it could be from the building as the premises were fenced in. The dowels referred to were slate cubes and could be trimmed by striking the end with a trowel, in like manner as bricks may be. For some reason, unknown to counsel for appellant, but evidently by mistake of the clerk, the judgment was rendered not only against James Steven but also against James Steven, Jr., while in point of fact and upon the pleadings the latter had been eliminated from the suit.

At the trial the plaintiff's attorneys admitted and the court ruled that there could be no recovery on the first two counts and consequently the case was submitted to the jury on the third count only. The jury found a verdict of $4,000, which, after the overruling of motions for a new trial, ripened into judgment, from which this appeal was taken.

Assignments of Error.

The court below erred:

1. In entering judgment against James Steven, Jr., he not being a party to the suit after the filing of the amended and substituted declaration on June 9, 1909 (Rec., p. 1).

2. In refusing to direct the jury that no recovery could be had under the third count, because plaintiff's intestate died more than a year previous to the filing of that count or cause of action.

3. Because defendant's plea of the Statute of Limitations to the third count of plaintiff's declaration was not demurred to nor was a replication filed to the same, nor issue joined thereon, and it appearing on the face of the record that said plea is true the plaintiff is not entitled to judgment upon said third count, in consequence of which the said plea must be taken to be admitted.

4. In refusing to grant defendant's first prayer "that upon the whole evidence the plaintiff is not entitled to recover."

5. In refusing to grant defendant's sixth, seventh, and tenth prayers.

6. In granting plaintiff's first and only instruction (Rec., p. 36).

7. In charging the jury in words following (Rec., p. 41):

> "If Mr. Stevens by his direction created an unsafe condition there, and did it negligently, as I said before, and by reason of that negligence the stone which struck and killed the decedent was dislodged from its place; if this all happened by reason of the negligence of Steven and could not have happened except for that negligence, it is no excuse for him, legally, that Dotts may have been negligent in using the rail as he did to get down on to the cornice. Although Dotts' negligence may have contributed to the accident, and

> although the accident would not have happened except for that negligence of Dotts, still the defendant may be liable, because in view of the law there would be two negligences operating together in that case, and the fact that Dotts was negligent and contributed to the accident would not relieve Steven of liability if his negligence also existed and contributed to the accident in the way I have stated."

The Declaration.

The appellee, as administratrix of the estate of her deceased husband, brought suit in the Supreme Court of the District of Columbia, to recover damages for the latter's death. The original suit was brought against the appellants, as described in the caption in this case, and subsequently, on the 9th day of June, 1908, the plaintiff filed her amended and substituted declaration (Rec., p. 1) wherein she claims damages of James Steven only. The amended and substituted declaration contained two counts, the first of which charges the defendant James Steven with having negligently failed to warn decedent of his danger and having neglected to have the engine, which he was at the time operating, placed at a lawful and proper distance from the building and without suitable covering, planking or protection above the same.

The second count charges that the decedent was in the service of the defendant (Rec., p. 3) as a hoisting engineer. His duties were to hoist stone by use of an engine, derrick, ropes and pulleys; that it was the duty of the defendant to employ competent stone-setters and helpers in hoisting, landing and setting the stones, and competent superintendents and suitable machinery, apparatus, materials and equipment and a reasonably safe place for said employees in which to work; that, not regarding his duty, the defendant carelessly neglected the

same, in that he failed to employ skilled stone-masons and helpers in erecting a balustrade or railing at the top of the building and failed to supply suitable engines, "derricks, appliances, dowels, materials and equipment for said work, and failed to provide competent superintendents to direct said work" and failed to provide a reasonably safe place for said employees to work in when signalling for, hoisting, landing and setting stone on top of the said building, so that while one stone was being hoisted to the top of said building another stone, previously set in place at the top as a part of the balustrade, was dislodged under negligent orders from the defendant and thereby caused to fall and strike previously set stones, precipitating said previously set stones, or parts thereof, out and upon the said Saunders, whereby death ensued, January 21, 1908. The defendant pleaded not guilty to each of the counts then forming part of the plaintiff's declaration and issue was joined thereon.

Thus stood the pleadings until the 15th day of March, 1909, whereupon plaintiff requested leave of the court, which was granted, to file an additional count, in which she charged in substance that Thomas Saunders was, on the 21st day of January, 1908, in the employ of James Steven, the defendant, as a hoisting engineer; that it was the duty of the defendant to use reasonable care, precaution and diligence (Rec., p. 6) in superintending and directing the setting of stones so that they would be securely and firmly set and not be liable to be pulled out or fall therefrom and injure defendant's servants engaged in and about the building; that, for the purpose of setting the stones with reasonable care, precaution, and diligence, it was necessary, and the defendant was required in and by the contract into which he had entered for the construction of said railing and balustrade, to use and place therein what is known as "dowels," to-wit, pieces of metal or slate projecting from one piece of

stone into the adjoining or adjacent piece of stone, holes being in each piece of stone to fit said dowels forming the balustrade, and cemented and fastened thereunto, by means of which dowels the said several pieces of stone would be firmly held in their proper places, as part of the balustrade. Yet the defendant, not regarding his duty, did direct, authorize and require a servant or servants in his employ, in setting said stones as a part of said balustrade, and in setting the stone hereinafter referred to, to cut off or entirely omit the use of said dowels in setting said stones, so that some of said stones were set as part of said railing or balustrade without the use of dowels and were infirmly, insecurely, and negligently placed in and as a part of and forming said balustrade or railing; so that thereafter, when an employee of the defendant on top of the building, was commanded by the defendant to land a stone, other stones were discharged and fell, striking decedent on the head.

First Assignment of Error.

The judgment in this case was rendered and now stands against James Steven, Jr., as well as James Steven. The younger Steven was not a party to the suit and therefore the judgment was improperly entered as to him. We are inclined to think the entering of judgment against James Steven, Jr., was an error of the clerk, but, however that may be, the judgment against him should be reversed. We assume this court has the power to reverse the judgment as to the younger Steven, no matter what its conclusions may be as to the judgment against the older Steven. If the court adopts appellants' views as to the law, and reverses the judgment as to both, that will end the difficulty; but if it should take a view different from that presented in the brief of appellants, then at all events, the judgment against James Steven, Jr., should

not be allowed to stand. The record clearly shows that James Steven, Jr., was not a party to the action after the plaintiff filed her amended and substituted declaration (Rec., pp. 1–2–3–4).

Second and Third Assignments of Error.

The plaintiff's intestate died on the 21st day of January, 1908. The third count of plaintiff's declaration was filed on the 15th day of March, 1909, and more than one year after the decease of Thomas Saunders. We challenge the plaintiff's right to recover under the third count, for two reasons; first, because that count constitutes an entirely new cause of action, and, secondly, because no plea was filed or issue joined to defendant's plea of the Statute of Limitations. We contend that the plea must be taken to be admitted, and, being admitted, the plaintiff was, so far as the third count is concerned, out of court.

Third Count—New Cause of Action.

A careful examination of the first and second counts of the plaintiff's declaration, both of which were ruled out at the trial, disclosed that the causes of action therein set out were totally different from that brought forth under the third count. The first count proceeds upon the theory that the omission of duty upon the part of the master was his failure to place the engine a properdistance from the building and to suitably cover the same over, which is an entirely different cause of action from that set forth in the third count. The latter charged the master with having negligently directed the cutting off or omission of dowels. To the first count the doctrine of the assumption of risk was applicable while to the third count the duty of the master to provide a safe place to work. These constitute a separate and distinct cause of action, in no wise relating to each other. The

third count, contrasted with the first, unquestionably constitutes a new cause of action. The amendment, therefore, after the expiration of the statutory period, was improperly granted.

The second count charges the defendant with failure to employ and retain competent and skilled derrick men, stone-setters and helpers and a sufficient number of stone-setters, helpers and derrick men, tag-line and signalmen, and failed to provide sufficient engines, derricks, appliances, dowels, materials, equipment, etc. Contrasting the second with the third count it will be seen that they state entirely different and distinct causes of action. For instance, the third count proceeds upon the theory that necessary materials were supplied, while the second count claims to the contrary, namely, that they were not supplied. The third count introduces an entirely new element into the case, namely, direction on the part of the master to cut off or omit the use of dowels. It is submitted that a careful perusal of these various counts will not only create but establish in the mind of the court the conclusion that it was error for the court below to have permitted the plaintiff to have filed a cause which set up a new cause of action, after the statutory period had elapsed.

Counsel fully appreciate that the court should ever be liberal in the granting of amendment; but where, on the other hand, the law limits the bringing of an action the plaintiff should be held to the letter of the statute and not be permitted, under the guise of an amendment, to introduce a new cause of action.

Plea of the Statute.

No matter whether the amedment was properly allowable or not, the plea of the defendant stood and now stands unchallenged, with no replication thereto. No issue was raised on this plea and therefore it must be

taken to be true; and even if the plea should not be construed to be true, a new trial should be granted, with leave to the plaintiff to file her replication to defendant's plea of the statute. The evidence establishes the truth of defendant's plea of the Statute of Limitations, so that by the rules of pleading, as well as the testimony introduced, the plea itself must be adjudged true and the plaintiff go without day.

Fourth, Sixth and Seventh Assignments of Error.

The plaintiff alleges in the third count of her declaration that defendant's superintendent, not regarding his duties in the premises (Rec., p. 6) did direct, authorize, and require a servant or servants in defendant's employ, in setting the stones as part of the railing, "to cut off" or entirely omit the use of dowels so that some of said stones were set without the use of dowels and were infirmly, insecurely, and negligently placed in said balustrade.

The plaintiff's only prayer was directed to the support of the foregoing averments, contained in the third count of the declaration. Plaintiff's prayer in substance is, if the jury believe that the defendant's agent directed the stone-mason to cut off or omit the use of dowels and the mason did cut off or omit their use, and by reason thereof the stones were rendered insecure and liable to fall, and did fall, whereby plaintiff's intestate was killed, then defendant was guilty of negligence (Rec., p. 36). The court's charge to the jury did not touch the question as to whether there was a direction by the defendant's agent to cut off the dowels, but simply as to whether there had been a direction to omit their use. There is no evidence anywhere in the record which shows that the cutting off of the dowels would have rendered the stones in which they were used insecure.

Obviously there could have been no negligence on the

part of the master to have directed the cutting off or trimming of the dowels in order that they might be made to fit, and the granting of the plaintiff's instruction was manifestly erroneous, certainly so in so far as that part of the instruction is concerned, because it emphasized such direction to cut the dowels off as an act of negligence on the part of the master. To state the proposition in a different form, it is this; the master had contracted to use dowels to unite the members of the balustrade together by the use of dowels and the cement which was placed around them. If the dowels were too large, or the holes in which they were to be placed too small, there could be but two courses to pursue, viz, either to trim the dowels or enlarge the holes. To characterize the cutting or trimming of the dowels as an act of negligence seems preposterous. The testimony, without contradiction, showed that the slate dowels, which were in the form of two-inch cubes, could be trimmed almost with exact nicety by striking the end with a trowel, the slate being brittle and breaking with the grain. We submit, therefore, that it was error for the court to submit the plaintiff's prayer to the jury, because it left the jury in a position to speculate or conjecture as to whether the dowels were trimmed or omitted, fixing liability in either case. If the master directed the stone-mason to cut off or trim the dowels, that order could not be construed as an act of negligence, because in the trimming of the dowels it would have become the duty of the stone-mason to have used good judgment so that the dowels would have served the purpose for which they were intended. Any other use of the dowels by the stone-mason, such as cutting them in half or otherwise rendering them unfit for the purpose for which they were intended, would have been an act of negligence on the part of the stone-mason and not justified by the instructions of the master,

and such act of negligence on the part of the stone-mason would have reached to his fellow-servants on the ground below.

It will therefore be seen that, irrespective of the fact that there was no evidence to show that the trimming of the dowels made the stones insecure, as a matter of law the instruction was not sound.

Omission of Dowels.

There is no testimony in the record, nor was there at the trial, to support the averments of plaintiff's third count, to wit, that there was a direction by the master to omit the use of dowels. The only testimony given concerning the cutting off or trimming, then, was given by one Dotts, who was a laborer employed to assist the stone-mason. His testimony may be found commencing on page 14 of the record. It seems that just prior to the luncheon hour the defendant's superintendent came up (this according to the testimony of Dotts only) and complained to the stone-mason that he was not progressing fast enough in the setting of the stones. The mason replied that the dowels did not fit. The superintendent said: "Set them stones; put them down—put them stones down; cut them off. I do not care what you do; you must set them stones. If you can not set them, I will get a man that will set them" (Rec., p. 14).

After the recess hour the same witness gave the following account of what took place just before the luncheon hour:

"He (meaning the superintendent) said to Mr. Maddox (meaning the stone-mason): 'I want you to set them stones. By God,' he says, 'if you can't set them stones, I will get somebody that can set them.' When he said that word, then Mr. Maddox claimed, in the first place, that the 'dowels' didn't fit very good. He said (meaning the superintendent), 'Hell with the dowels.' That is

what he said—'Hell with the dowels; damn it, cut them off. You want to get them stones down. If you can't get them down, I can get a man that can get them down.' That is what he said."

The witness Dodds further testified that dowels had been used in the work, and that there were plenty of them. That it was his duty to keep the mason supplied with them as the work progressed.

On cross-examination, Dotts testified that after the superintendent complained, and Maddox stated that the dowels did not fit, that the superintendent said: "Fit hell! Damn it, cut them off; get them down; set them stones. If you can not set them, by God, I can get a man that can set them."

The witness Dotts could not say whether the mason cut the dowels off when he set the stones after the conversation that he testified occurred between the superintendent and Maddox; that Maddox could have cut them off if he wanted to.

It is not intended, in presenting this aspect of the case, to invade the province of the jury, because if there was evidence from any witness which might fairly imply that the instruction was given to omit the use of dowels then we would be precluded from raising that point in this court, that being a question for the sole consideration of the jury. But our contention is that there was no evidence which would justify a jury, or anyone else, in concluding that the defendant's agent had directed the omission of the use of the dowels, and if there was no evidence then it was error to have submitted that question to the consideration of the jury, also error to have granted the plaintiff's prayer and to have refused the defendant's fourth prayer and for the court to have given the instruction it did on this new count.

The language which is sought to be construed into a

direction to omit the use of dowels has been quoted at length and when analyzed resolves itself into a direction from the master to the stone-mason to cut off or trim the dowels, in order that they might be made to fit. This direction, if it did occur, followed the complaint made by the stone-mason that the dowels did not fit very good.

If any other meaning is to be placed upon the direction which Dotts testified the superintendent gave, then a construction must be adopted which puts in defendant's mind a thought at variance with his language. "Cut them off" was the language used, after Maddox complained that the dowels did not fit. It would require a violent distortion of language to convert these words into a direction to entirely omit the use of the dowels.

The fact is, as has been previously pointed out under the assignments of error alluded to under this section, that the plaintiff was relying upon that language to establish the averment in their declaration that a direction was given to cut the dowels off, and her prayer also embodied the same idea, for both in the third count and the prayer it appears that the cutting off of the dowels is charged as an act of negligence on the part of the defendant. As was stated by the court in its charge to the jury (Rec., p. 39):

> "It is claimed in the declaration and upon the evidence that Steven told Maddox to hurry along with his work, even if he had to get along without the dowels; and that is the point in dispute. Did he give those directions? He says he did not. Maddox says he did not. Mr. Dotts says he did."

But the difficulty with this part of the court's instruction is that it assumes that Dotts testified that a direction was given to omit the use of dowels when there was nothing in the record to justify such an assumption.

Why should the jury be allowed to speculate as to what Steven intended to say, or what he intended to mean when the language, in view of the surrounding circumstances, was to apply to the condition which Maddox said existed, namely, that the "dowels did not fit very good" (Rec., p. 16). What occasion was there to omit the use of dowels? All of the witnesses testified that these were cube pieces of slate which could be cut or trimmed by a trowel just the same as a brick could be trimmed or cut. The superintendent knew this, Maddox knew it, as also did Dotts. What sense can there be, then, in attributing to Steven a direction to omit their use any more than a direction to trim them to fit?

It is a matter of no consequence as to what Steven or Maddox testified to concerning this matter. They both denied that there was such a conversation and had Dotts testified that Steven had directed Maddox to omit the use of dowels that would have been the end of the matter. But such is not the case. It was admitted in the court below, and must be conceded here, that if Steven did not direct the omission of the dowels that there could be no recovery. Therefore, on this branch of the case, the polar star for our guidance, is the language which Dotts attributes to Steven and which has been fully set out.

It is rather interesting to note that part of Dotts' testimony which we quote as follows (Rec., p. 19):

> "A. I said if I noticed I could have seen, but they were there to be put in; I was sure they were in myself according to what we had been setting them all the time with the dowels in, you know."

Whether the dowels were used or not is a question of no serious moment, for the right to recover in this case turns upon the single proposition; was there a direction

by Steven to omit the use of dowels? We respectfully submit that it must be a strained and forced construction of plain and unambiguous language to justify a deduction that to "cut off" meant to omit or eliminate, but according to plaintiff's contention it made no difference (especially in light of plaintiff's third count and first prayer) whether the order was to cut the dowels off or to entirely omit their use. The defendant was to be charged in either event and the jury permitted to guess as to which. So that if we find the language used as a direction to cut off or trim the dowels there could be no recovery, and unless the record somewhere discloses evidence fairly tending to show that there was a direction to omit them, the plaintiff is likewise precluded from recovery of any damages from the defendant.

It is respectfully submitted that this court should act with great caution in allowing a judgment to stand which thrusts upon the defendant a direction which could not fairly be justified by the language used.

The Fifth Assignment.

Proximate Cause.

Admitting, for the purposes of this assignment, that the dowels were omitted by the direction of the master's superintendent, yet it is contended that such direction and omission was not the proximate or moving cause that resulted in the death of plaintiff's intestate. There was nothing inherently dangerous in setting the stones without the use of dowels. If the contract had not called for dowels, but simply that the members be firmly cemented together, and the witness Dotts had proceeded to climb down from the top of the balustrade to the cornice below, using as his means of support a stone which was newly set, and the cement under which was green, nobody would suppose for a moment that the

master would have been chargeable for the negligence of his employee, nor would the master have been liable to the fellow-servant, Saunders. It is therefore not apparent why the master should be held liable under the same conditions, except that the contract called for the use of dowels. Dowels or no dowels, the stones, cemented as they were, would have remained in place but for the foolhardy act of the witness Dotts in assuming to use as a support a stone freshly laid upon a bed of thin, watery cement. That bed of cement rendered the piece of coping slippery and insecure, so that the slightest effort would cause it to slide. Dotts knew the stones had been lately placed in position, for he had assisted in placing the cement under them, and his experience as a stone-mason's laborer gave him a perfect understanding of their susceptibility to move until such time, of course, as the cement had hardened. Common sense would impress any man with the utter senselessness of using a piece of stone, in such a condition, as a support to carry a man's weight—in this case 175 pounds. And yet for that senseless act on the part of the servant the master is sought to be held liable, upon the theory that the omission of dowels constituted an act of negligence and omission of duty in failing to furnish a safe place to work.

If the proximate cause is the moving cause, the initiative, let some one please answer the question as to how an inanimate stone could have left its position—whether with or without dowels—unless upon the intervening act of carelessness on the part of the stone-setter's helper?

Dotts, in the case at bar, had full knowledge of how the stones were laid. He was there and saw them laid. No one will question that he had no right to recover. Where, then, does the fellow-servant doctrine end! Was his knowledge that of the fellow-servant below? Was

his negligence in walking upon and climbing down from a stone in a green state the negligence also of the fellow-servant below? We respectfully submit that it was.

How could the master suspect that he would do such a foolish act? And yet, without his act, no injury would have befallen anybody. The ludicrous situation is presented that without the negligence of Dotts the master is chargeable with no omission of duty, while with his negligence the master is charged with an omission of duty, and held in damages. The reasoning is at fault or the doctrine contended for silly.

Law.

The law covering this aspect of the case is well settled. The legal formulæ by some courts has never been as lucid as those of others. The rule is concisely stated in several Supreme Court decisions.

In Railway Co. *vs.* Kellogg, 94 U. S., 469, it is thus stated:

> "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous action, the events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

It seems to us that there was a "new and independent cause intervening" in the case at bar, namely, the intervention of the human agent Dotts. In illustration, let us suppose that the master directed the omission or the cutting off of the dowels and the piece of coping slid from its bed and produced the injury, no human agency intervening. In such a case there would be an uninterrupted sequence of events, all traceable to the negligent direction of the master; but where, as in this case, we have a safe condition until the act of Dotts rendered it

unsafe, it must be resolved that it was that "human intervention" that resulted in the fall of the stone, rather than any order to cut off or omit the dowels.

The rule is again stated by the Supreme Court in this language:

> "The proximate cause is the efficient cause—the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the impossible ones."
>
> Insurance Co. *vs.* Boone, 95 U. S., 130.

If the proximate cause is "the one that necessarily sets the other causes in operation," how may it be said that it was the omission of dowels, rather than the act of Dotts, that caused the stone to fall? The omission of dowels did not set anything in motion. It produced a condition which, but for the carelessness of the employee, was in no wise dangerous or calculated to become dangerous. The master could not have foreseen the careless act which set in motion the cause which resulted in Saunders' death.

Judge Jenkins, speaking for the Circuit Court of Appeals, Seventh Circuit, in the case of Goodlander Mill Co. *vs.* Standard Oil Co., 63 Fed. R., 405, states the rule thus:

> "The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. The absence of the valve was doubtless, in a sense, the cause of the injury—an antecedent cause; but when the negligent act is not wanton or malum in se the law stops at the immediate, and does not reach back to the antecedent, cause. The casual connection between the negligence and the hurt is interrupted by the interposition of a human agency."

The court's attention is respectfully directed to this case. The absence of the valve on an oil tank car, which cars were usually equipped with valves, was assigned as the proximate cause of an injury suffered by the mill company from the escape of oil from the tank and the destruction by fire of its mill. We further quote from the opinion of Judge Jenkins:

> "Was the intervening, efficient cause a new and independent force, acting in and of itself in causing the injury, and superceding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an action or condition. Here the company gave the negligent act a mischievous direction. If, but for such interposition, the defendant's negligence would have produced no injury, the casual action is broken, because the intervening act made the act of negligence, otherwise innocuous, operative to injury. . . . The negligent omission of the valve did not necessarily set the other causes in operation."
>
> Collision Case—Chicago, etc., Ry. Co. *vs.* Elliott, 55 Fed. R., 949.
>
> Caboose Case—The Paumpeck, 86 Fed. R., 924.
>
> Insanity Case—Schaeffer *vs.* Railroad Co., 105 U. S., 249.

In Kern *vs.* Dexter, etc., Co., 24 N. Y. S. R., 948, the court laid down the doctrine as follows:

> "Where several proximate causes contribute to an accident and each is an efficient cause, without which the accident would not have happened, it may be attributed to all or any of them, but it can not be attributed to a cause unless without its operation the accident would not have happened."

In Harvey *vs.* Railway Co., 32 N. Y. S. R., 813, a car with a defective brake was left standing on a side-track,

without being blocked, and started to move, thereby colliding with a passenger train and causing an injury. The court said:

> "The main question is whether the defective condition of the brake was the cause or one of the producing causes of the accident; held, that the injury was occasioned solely by the fault of the employees failing to secure the car and that the defective brake had nothing whatever to do with it."
>
> Rowes *vs.* Railway Co. (Texas, Oct. 27, 1891).
> Carter *vs.* Towne, 103 Mass., 507.
> Davison *vs.* Nichols, 11 Allen, 514.

Kelly *vs.* Jute & Foley Co., 104 Fed. Rep., 955 (Pa. Circuit Court of App., 1900):

Defendant company, which was engaged in the construction of a bridge, furnished for use in the work a steam derrick, which was complete and properly constructed, but required to be set in position and secured before being used; and employees were directed to perform that work, and materials therefor were furnished them. Before they had completed the fastenings they were temporarily called away, and a foreman, who was a fellow-servant with plaintiff ordered the derrick to be used, although he had been told by one of the workmen that it was not yet secured and its use was unsafe. The derrick gave way by reason of the absence of such fastenings, and the plaintiff was injured. Held, that the injury was not due to the failure of defendant in its duty to furnish a reasonably safe place to work on a safe appliance, but solely to the negligence of the foreman, plaintiff's fellow-servant, for which defendant was not liable.

Circuit Judge Dallas (958): The derrick was, it is true, set in motion when it ought not to have been, but that was done by a fellow-servant; and this quite separate

and distinct fault, not the absence of the bolts from the cap log, was the proximate cause of Kelly's injury.

> "In order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances;"

and obviously the harm which Kelly suffered was not the natural and probable consequence of the interruption of the work of the carpenters and one which ought to have been foreseen as likely to flow from it. It resulted from "a new cause and a sufficient cause"—the premature and forced operation of the engine; and for that act the appellee was not, under any possible aspect of the case, responsible. It did not do it, nor order it to be done, and can not be said to have even tacitly or passively induced it; for it is admitted, indeed insisted, that it was really directed by Bennett, who in fact, and as the plaintiff further admits, had been expressly warned that the work of preparation was unfinished. It may be conceded that the engineer, in view of Bennett's direction to him, was not at fault; but the only effect of this concession is to cast the blame upon Bennett, who, as well as the engineer, was a fellow-servant of Kelly. It does not fix it upon the Jutte & Foley Company, which, as to all three of them, stood in the legal relation of master.

Scheffer *vs.* Railroad Co., 105 U. S., 249, 26 L. Ed., 1070.

Dredging Co. *vs.* Walls, 28 C. C. A., 441, 84 Fed., 428.

Railroad Co. *vs.* Conroy, *supra.*

One of the tests of proximity is to establish whether any cause has intervened between the fact accomplished

and the alleged cause. Here we have the intervening cause of the act of Dotts in setting in motion the stone which accomplished the injury.

In Herr *vs.* Lebanon, 49 Pa., 222, a horse was drawing an omnibus up a hill along a road upon the side of which was a declivity unprotected by any barrier. The horse, for some cause, fell, and in struggling to arise fell over the unprotected declivity. The jury found specially that the defendant was negligent in not protecting the dangerous side of the road. They also found that their negligence did not produce the fall of the horse. It was held that the fall of the horse was the proximate cause, and the negligence of the defendant was the remote cause of the injury. In this case, the fall of the horse in itself produced no injurious consequences, but in connection with the unprotected side of the road injurious consequences were produced. Applying this case to that at bar we find that the jury might have found the master negligent, he omitting the dowels. They might, and should, also have found that such omission of dowels did not produce the fall of the stone. The proximate cause, therefore, was the act of the fellow-servant.

No useful purpose will be served by the further citation of authorities. The facts in the case at bar bring the case within the doctrine cited.

It is respectfully submitted that the judgment of the court below should be reversed.

A. A. BIRNEY,
HENRY F. WOODARD,
Attorneys for Appellants.